No. 887 SUPREME COURT, U. S.

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BRIEF AND APPENDIX
ON BEHALF OF APPELLANTS

United States Court of Appeals for the Fourth Circuit

No. 7543

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA AND T. EDWARD RUTTER, DIVISION SUPERINTENDENT OF SCHOOLS OF THE COUNTY OF ARLINGTON, VIRGINIA,

Appellants

v.

CLARISSA S. THOMPSON, ET AL.,

Appellees

Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division

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Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division

BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

This case was heard by the court below on September 11, 1957, upon the appellees' Motion for Further Relief in connection with the injunction granted by order dated July 31, 1956, restraining and enjoining the appellants from enforcing and pursuing the policy and practice of segregating, on

NOTE: Throughout this brief, the appellants are sometimes referred to as defendants, and the appellees are sometimes referred to as plaintiffs.

the basis of race or color, the children attending the public schools of Arlington County. That order was affirmed by this Court and certiorari was denied by the Supreme Court of the United States. See, 240 F. (2d) 59 (1956); ..... U. S. ....., 77 S. Ct. 667, 1 L. Ed. (2d) 664 (1957).

In July, 1957, the plaintiffs filed a Motion to Modify Injunction Decree seeking an order specifying that the plaintiffs would not have to comply with the requirements of the Virginia Pupil Placement Law, enacted in September, 1956 (Appellants' App. I). This was denied on July 27, 1957 (Appellants' App. II), and the district court's order was entered on July 29 (Appellants' App. III).

Thereafter, three of the infant plaintiffs filed on September 9, 1957, their Motion for Further Relief asking for a decree directing the defendants to admit them to the schools in which they allegedly had sought admission. On the same date, four Negro children filed a Motion to Intervene and their Complaint in Intervention, seeking the same relief as prayed for in the Motion for Further Relief (Appellants' App. V and VI). Without notice to the defendants, orders were entered the same day, *ex parte*, granting the intervention (Appellants' App. VIII) and setting September 11, 1957 as the date to hear the Motion for Further Relief on its merits (Appellants' App. VII).

On the said September 11th, the defendants filed the following motions:

1. Motion to Continue Hearing on Plaintiffs' Motion for Further Relief.
2. Motion to Vacate Order on Motion to Intervene.
3. Motion to Dissolve the Injunction.
4. Motion to Dismiss the Motion for Further Relief.

After oral argument, the court below denied the first three motions set forth above but did not, and as yet has not, passed on the defendants' Motion to Dismiss the Motion for Further Relief. Instead, the court immediately proceeded to hear evidence on the plaintiffs' Motion for Further Relief (Appellants' App. XVI).

On September 14, 1957, the court below entered its decree directing that seven plaintiffs be admitted to the schools of their choice.

THE QUESTIONS INVOLVED

Point I

Were the proceedings prematurely heard and tried, without adequate notice, and in violation of the Federal Rules of Civil Procedure and the Rules for the Eastern District of Virginia?

Point II

Is the Pupil Placement Act (Chapter 70, Acts of Assembly, Extra Session, 1956) valid insofar as it divests the defendants of power and authority to admit or enroll pupils in the public schools of Arlington County and vests such power in the Pupil Placement Board?

Point III

Were the allegations of the Motion for Further Relief and the testimony in support thereof, sufficient to justify the Court in placing the plaintiffs in the schools to which they sought enrollment?

Point IV

If the Placement Act be void in its entirety, should the local school authorities be given an opportunity to exercise

their judgment in passing upon requests for enrollment into specific schools before the Federal Court exercises such function of school administration?

STATEMENT OF FACTS

The Arlington school system is divided into elementary and high school districts. It consists of approximately 40 school buildings. It has an enrollment of 1,432 Negroes and 21,245 whites. There is one combination junior and senior high school for the Negroes and there are two senior high schools and six junior high schools for the whites. There are three elementary schools for the Negroes and 27 for the whites. The elementary schools are divided into 33 districts, of which there are three for the Negroes and 30 for the whites. Both high school and elementary districts are shown on the plats which were filed as exhibits in the court below. Heretofore, the school system has been operated on a segregated basis in obedience to the law of Virginia.

Specific Steps Taken by Each of the Plaintiffs

Of the seven plaintiffs involved two, Harolyn Johnson and Rita Johnson, are the children of Dr. Harold M. Johnson of 2901 North Lexington Street, in Arlington. On the opening day of school, he presented them at Washington-Lee High School for entry in the senior and sophomore years, respectively. Washington-Lee High was about 2½ miles distant from his home. Upon arrival at the school, he spoke with the principal and was told that in view of the fact that his children were entering the Arlington system for the first time, pupil placement forms would have to be signed and filed either with the school or the Pupil Placement Board and the address of the latter in Arlington was given him. No mention of race, color or qualification was

made and no refusal or objection of his children's entering the Arlington school system was offered nor was there any discussion of available facilities or transportation. He made no objection to the procedure indicated and taking the forms with him he stated to the principal that he would talk it over with his wife and decide what to do and left. Nothing was said to indicate he was being treated any differently than a white person who was applying under the same circumstances. He never returned to the school, nor sent the forms in, nor did he communicate in any way with the Pupil Placement Board or the school authorities. He had his children admitted as intervening plaintiffs in this suit two days before trial. Dr. Johnson's controlling reason for asking admission to Washington-Lee High was that it was a little nearer than Hoffman-Boston High although he attempts to widen this somewhat by claiming he wanted his children to have four years of high school Latin. Without impugning his motives, nevertheless, it is fair to say that it can be easily deduced from the circumstances disclosed by the evidence that his real reason for presenting his children to Washington-Lee High was to add his prestige to the plaintiffs in this suit by asserting a right of entry he never intended to exercise.

The next plaintiff mentioned in the evidence was Robert A. Eldridge, III, son of Robert A. Eldridge, Jr., of 2716 1st Street, South, Arlington. On August 15th, the day for entering children who had not previously been entered in the Arlington school system, the father went to Patrick Henry School and was told by a Miss Vance that he would have to fill in a Pupil Placement form. He did not take the form then, but returned an hour later and picked up a form and said he would talk it over with his wife and decide whether to return it. He never executed the form. He wanted his child placed in the school nearest his home and thought if he signed the form, the Pupil Placement Board

would place him somewhere else. He went to the School Board headquarters and discussed the matter there and was told to fill in the form. On the opening day of school, he presented his child to Fillmore School and was told to go to Clay School, as they had run out of pupil placement forms at Fillmore. At Clay, he was again told to fill in the form. On this second go round, he had the forms in his pocket but did not mention that fact at either Fillmore or Clay. No mention of race was made at any of the interviews. The only thing mentioned by the authorities was that he would have to fill in the form. He and his wife decided not to fill it in and he never did execute it and never gave any information to the effect he was not going to do so to any school authority. All he did was state he wanted his child entered in the nearest school.

The next plaintiff mentioned in the evidence was George Tyrone Nelson, son of Dorothy P. Nelson of 2005 North Cameron Street, Arlington, who had been a student at Hoffman-Boston High for three years and was assigned back there for another year. Mrs. Nelson allegedly made application for entrance to Stratford Junior High by filling in the pupil placement form, without mentioning that the child was already enrolled at Hoffman-Boston, or where she desired the child to attend. She made out no transfer application. On opening day a white woman named Davis took the child first to Stratford and was refused admission because he had not been assigned there, and then took him to Hoffman-Boston where he was entered and was in school at the time of the hearing. No mention was made of color or race by anyone in the entering application or requests or by any school authority involved.

The next plaintiffs mentioned were Louis G. Turner and Melvin H. Turner of 5132 North 22nd Street, Arlington. They are the stepchildren of Arthur M. Costley, who testi-

find that their mother took them to Swanson Junior High School in August and was given pupil placement forms which the school authorities filled out for her. She brought them home and she and her husband decided not to sign them. Neither these forms nor any transfer application was ever signed. He took the children to Swanson Junior High on opening day and was told again that they could not be admitted unless pupil placement forms were signed and then took them to Hoffman-Boston High and entered them. The only reason given for having them entered at Swanson was that it was the nearest school.

The last of the plaintiffs was Leslie Hamm, Jr., son of Dorothy M. Hamm of 1900 North Cameron Street, Arlington. The child had finished the elementary grades in Langston School in the Hoffman-Boston district and applied in August for admission to Stratford Junior High which the parents thought was the nearest of the Junior Highs. The principal told them they would have to fill out a pupil placement form which they never did. They never communicated further with the school authorities except by letter to the School Superintendent which the mother said was intended to "make it a matter of record". No mention of race was made at any time. On opening day a white woman by the name of Davis took the boy to Stratford Junior High where he was denied admission. No reason other than failure to sign a pupil placement form was given for the refusal.

The Court Ignored School District Lines

The Arlington County school system, both elementary and high, is divided into school districts. The Hoffman-Boston High School District, for both junior and high, is in two segments some distance apart. North of the north segment of this district is the Williamsburg Junior High District;

East of it is Stratford Junior High District, and South and West of it is Swanson Junior High District. The court order took George Tyrone Nelson, who lived in the north segment of the Hoffman-Boston High School District and who had been attending Hoffman-Boston Junior High for three years, out of that district and placed him in Stratford Junior High, thus breaking down the district lines without abolishing the Hoffman-Boston district in violation of the rules and regulations of the School Board to the effect that each child should attend school in the district of its resident. The same order took Louis G. Turner and Melvin H. Turner, who lived in the north segment of the Hoffman-Boston High district and had been attending Hoffman-Boston High (and who were neighbors of George Tyrone Nelson) out of the Hoffman-Boston district and placed them in Swanson Junior High. The districting as laid out on the exhibit map has never been voided or declared illegal by any court and the school authorities could not violate their own rules and regulations of attendance in the respective districts so long as the districts themselves were left intact and above all they could not take one child out of Hoffman-Boston district and place him in Stratford, and two others and place them in Swanson, at the same time leaving the boundaries of all districts intact.

Plaintiffs Are Not Entitled to Enter a Particular School Simply Because It Is the Nearest

Another fact of importance is that children are not assigned to the school nearest their residence, but are only assigned to the school in the district of their residence. In placing the colored children in schools nearest their residence the court order discriminates against white children who do not have such privilege. For instance, children living

along the east side of Glebe Road at North 16th Street are only a block and a half from Woodlawn School but because they are in the Page School district they are required to go some thirteen or fourteen blocks to the Page School. Children living near the County line along North Montague Road are required to go some ten or twelve blocks to Stonewall Jackson School, when both Ashlawn and Glencarlyn Schools are much closer. Children living only a block and a half from Yorktown School are required to go three or four times that far and attend Jamestown School. Children facing on the south side of Lee Highway near Lexington Street have the Robert E. Lee School at their door, while those on the other side of the road are compelled to go seven or eight blocks to the Nottingham School.

The elements considered in laying out school districts were not fully developed in the evidence but certainly the boundaries are not to be broken down in order to place two or three children in their nearest schools.

Hoffman-Boston is not the only district in segments. Ashlawn has two segments not adjoining each other. For some purposes, Nottingham District has three segments.

ARGUMENT

I.

The Proceedings Were Prematurely Heard and Tried, Without Adequate Notice, and in Violation of the Federal Rules of Civil Procedure and the Rules for the Eastern District of Virginia.

This was true in the following instances:

1. An order permitting the intervention of Harolyn Johnson, Rita Johnson, Robert A. Eldridge, III and George Tyrone Nelson, infants, and their respective parents, was

entered September 9, 1957, *ex parte*, without any notice to the defendants whatsoever. This was contrary to Rules 24c and 6d of the Federal Rules of Civil Procedure, there being no cause alleged or found by the Court for such *ex parte* hearing. In fact, it would appear from the notice (dates blank) attached to the Motion to Intervene that the plaintiffs recognized the propriety of giving notice of such motion.

2. The Motion for Further Relief was filed on the morning of September 9, 1957, without prior notice to the defendants; the hearing on the motion was set for 10:00 a. m. on September 11 without consultation with or notice to the defendants; notice of the hearing and copies of the motion were served on local counsel for the defendants at 4:25 p. m. on September 9, leaving just one working day for preparation; no facts were alleged or cause shown why the Court should not grant the usual five day notice pursuant to Rule 6d of the Federal Rules of Civil Procedure; and Rule 13 of the Rules for the Eastern District of Virginia was ignored. The latter rule reads, in part, as follows:

> "2. That with all motions there shall be filed and served a statement, with appropriate references, of the statutes, rules or authorities, if any, upon which the movant will rely, and that not less than 2 days before the return day of the motion, the respondent shall file and serve upon the movant a like statement of the statutes, rules or authorities, if any, upon which the respondent will rely in opposing the motion."

3. On the morning of September 11, after denying (a) the defendants' motion to continue, (b) the defendants' motion to vacate the order permitting intervention, and (c) the defendants' motion to dissolve the injunction, the District Court immediately proceeded to take testimony and

pass upon the prayers of the plaintiffs' Motion for Further Relief, without first passing upon the defendants' motion to dismiss the same and without any opportunity being afforded the defendants to answer said Motion for Further Relief. Because the defendants had not previously concerned themselves with making assignments and had no information as to the propriety of the enrollment sought, adequate time, after ruling on the legal sufficiency of the motion, should have been afforded to the defendants to gather pertinent facts. Under the circumstances, the defendants had no testimony to offer.

Although designated "Plaintiffs' Motion for Further Relief," the pleading was in reality an original complaint by each of the seven colored children (four of whom were strangers prior to September 9 to any litigation affecting their rights to attend school) alleging that they, as particular individuals, had been denied admission to the public schools of Arlington in violation of the 14th Amendment. The fact that the plaintiffs sought to use the original class action as a vehicle is no reason to deny the defendants due process of procedural law, as embodied in the Federal Rules of Civil Procedure, namely, to have the sufficiency of the complaint tested by a motion to dismiss (Rule 12(b)(6)), to be thereafter allowed ten days to answer the motion and raise issues of fact (Rule 12 (a)); and to then try the issues of fact after reasonable time for preparation. On the contrary, these seven children filed their complaint and concluded the trial thereon in less than three days without any answer thereto having been filed. The Federal Rules of Civil Procedure make no distinction as to the color or race of the litigants. Yet that very effect was obtained in this instance: a so-called class action was brought wherein all Negro school children in Arlington County, present and future (even per-

sons yet unborn) may bring their complaints without twenty days' notice to the defendants, without having the legal sufficiency of the complaint tested before a trial on the facts, and without having their cases placed on the docket for trial in due course.

This novel and discriminatory result has been achieved by prosecution of a "class-action" suit. It is submitted that no such result was contemplated by Rule 23. The Rule contemplates that where a class is numerous, one or more persons may, on behalf of all, sue "when the character of the right to be enforced for or against the class is * * * (3) several, and there is a common question of law or fact affecting the several rights *and a common relief is sought.*" (Italics supplied.) The plaintiffs recognized and alleged this in their original complaint as justification of the class action. An injunction was obtained for the benefit of the class and this has become final. But now there is no basis for a class action in enforcing the claims of the *individual* or several members of the class because there is no common question of fact relating to all members of the class, or even to the seven individual pupils involved in this appeal; and no common relief is sought. While the question of fact in the case of each of the seven children is: "Was he denied admission because of race or color," there must be an individual determination as to each one. Assume there had been discrimination as to one but not as to the others: this would not justify the requiring of all seven to be admitted to the schools of their choice; and conversely, the denial of relief as to the six would not justify denial of relief to the seventh. Thus no "common relief" is sought as is required by Rule 23.

The very fact that Harolyn Johnson, Rita Johnson, Robert A. Eldridge, III and George Tyrone Nelson, infants, found it necessary to intervene demonstrates that common relief is not sought. The concept of a class action is that one

or a few obtain a judicial determination for the benefit of all in the class.

The individual nature of the specific complaints of the plaintiffs was noted by the District Court in the memorandum accompanying the order of July 27, 1957, when it was said:

> "If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting, his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and precision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand." (Appellants' App. II)

The individual complaints here involved are foreign to the principle of a class action. Being complaints of denial of constitutional rights, based on the peculiar facts relating to each individual plaintiff, such complaints should follow the procedure required in individual civil suits, and the defendants are entitled to such procedure.

II.

The Defendants Were and Are Without Authority to Admit or Enroll the Plaintiffs in Any School of Arlington County by Reason of the Pupil Placement Act, Chapter 70, Extra Session, 1956.

Chapter 70 of the Acts of Assembly, Extra Session, 1956, divested local school boards and division superintendents of

all authority to enroll or assign pupils in public schools and placed such authority in a new state agency called the Pupil Placement Board. This Court has held that the administrative remedies to appeal a decision of such Placement Board are not adequate. *School Board of City of Newport News* v. *Atkins*, 246 F. (2d) 325 (1957), cert. den. October 21, 1957.

However, this Court has not held said Act unconstitutional *in toto*. The transfer of enrollment authority from local to state officials is entirely severable and divisible from the administrative remedies which have been found tainted. The legislative intent to transfer such authority can be given effect even in the absence of any administrative remedies. Such transfer of authority can and should be given effect, despite the partial invalidity of the Act. *New* v. *Atlantic Greyhound Co.*, 186 Va. 726, 43 S. E. (2d) 872; 82 C. J. S., Statutes, Sec. 93.

Since no Federal question is involved in transferring such authority, the Federal courts should follow the State law. The precise point is now pending before the Supreme Court of Appeals of Virginia in the case of *DeFebio* v. *County School Board of Fairfax County*, and should be decided before the hearing on this appeal.

If the Placement Act is valid to transfer such authority from the local officials to the Placement Board, then:

1. The Motion to Dissolve the Injunction of July 31, 1956, as modified by the Order of July 27, 1957, should have been granted because the defendants are now without power or authority in the subject matter of the injunction.

2. The Motion to Dismiss the Motion for Further Relief should have been granted because the plaintiffs' motion shows on its face that the plaintiffs refused to make application to the Placement Board for assignment or transfer.

3. The plaintiffs' Motion for Further Relief should have been denied for the reason set out above in Paragraph 2, and for the further reason that the Placement Board was not a party thereto.

III.

Neither the Allegations of the Motion for Further Relief, Nor the Proof Offered, Was Sufficient to Justify the Relief Granted.

The said Motion of the plaintiffs did not allege that any of the seven children had been denied admission to the schools on account of race or color. And each of the plaintiffs' witnesses admitted that race or color played no part in the denial of admission—it was solely because the parents refused to make written application for admission as required by the Placement Board, except in one case (George Tyrone Nelson) where the assignment was made to a school other than one to which he presented himself, and the parent made no application to anyone for a transfer from the assigned school (Tr. Johnson, p. 8, *et seq.*; Eldridge, p. 22, *et seq.*, p. 37; Costley, p. 77, *et seq.*, p. 89; Hamm, p. 101).

The plaintiffs' Motion did not allege to which schools the seven children applied, nor did it allege any facts which would entitle the particular children to be admitted to the particular schools applied to. At the trial it was brought out for the first time the various schools to which the seven children had applied; but the only reason given for applying to those schools was that was the nearest to their homes in each instance. It was never shown that a white child had ever had the right to be enrolled in the school nearest his home. Imagine the dislocation, the overcrowding of some schools and classes and the small attendance in others, if white children were granted the same privilege that has been

granted these colored plaintiffs—to attend the school nearest his home, with no other factors whatsoever being considered.

IV.

If the Placement Act Is Void in Its Entirety, These Defendants Should be Given an Opportunity to Exercise Their Judgment in Making the Assignments Before the Federal Court Exercises That Function of Local School Administration.

The placement of pupils is an administrative function, and should not be undertaken by the Federal Courts unless and until it is clear that the proper school authorities either refuse to do so, or do so illegally. Being agents of the Commonwealth of Virginia, these defendants are under a duty to comply with State laws until such laws are held invalid by a final judgment. When the judgment here appealed from was entered on September 13, 1957, there had been no such final judgment outlawing the Placement Act. Further than that, on July 27, 1957, the District Court in this very case denied as premature a motion of the plaintiffs which would have permitted them to by-pass the Placement Act (Appellants' App. III), by which action the Court impliedly, if not specifically, directed these defendants to follow said Act until ordered otherwise. In obeying the Placement Act the defendants kept hands off all matters relating to the assignment and enrollment of pupils for the September 1957 term. Any decision completely invalidating the Placement Act, should provide for an orderly transition in revesting the enrollment functions in the local authorities and permit such local authorities to weigh factors and problems not before the Court such as relative achievement levels, proper distribution of school population into school districts, transportation, efficient use of school buildings and person-

nel, and others. The interest of the public in having an orderly school system administered by school officials would seem to outweigh the interest of the seven plaintiffs in getting in a desegregated school a few weeks sooner.

CONCLUSION

In order to resolve doubts which now exist, this Court should either unequivocally declare the Placement Act invalid in its entirety, or should clearly define those parts which are valid and those which are not.

If that part of the Act is valid which divests local school officials of placement power and authority and vests it in a State Placement Board, then this Court should reverse the judgment of September, 1957 and dismiss the injunction herein.

If the Placement Act is void in its entirety, then this cause should be reversed and the Motion for Further Relief dismissed for failure to establish a right to the relief prayed for; or it should be reversed and remanded with instructions to permit the defendants to pass upon the applications of the seven plaintiffs for enrollment; or in any event to give the defendants an adequate opportunity to present evidence against the enrollments demanded by the plaintiffs.

Respectfully submitted,

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Dated: December 5, 1957

I.

MOTION TO MODIFY INJUNCTION DECREE

Plaintiffs move the Court to modify the decree entered in this action on the 31st day of July, 1956, in the following particulars:

1. By deleting the words "at the beginning of the second semester of the 1956-57 session, to-wit, January 31, 1957," following the words "elementary schools" in the paragraph thereof numbered 3, or by such other changes in the language of said paragraph as may be necessary to make said injunction effective in respect to elementary schools at the commencement of the regular session for 1957-58 in September, 1957.

2. By addition of a proviso to the paragraph thereof numbered 4 specifying that the provisions of said paragraph do not necessitate compliance with the requirements sought to be made by Chapter 70, Acts of Assembly, Extra Session 1956, Virginia Code, 1950, Sections 22-232.1 to 22-232.16, inclusive.

3. By addition of a provision specifying that plaintiffs recover from defendants their costs in this action accruing in this Court, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States.

4. For such other changes in said decree as may be necessary or appropriate to the accomplishment of either of the purposes aforesaid.

.....

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II.

COURT'S MEMORANDUM ON MOTION TO AMEND DECREE

(Dated July 27, 1957)

I. To render it current, the decree of July 31, 1956 will be amended so that its injunction will become effective in respect to elementary schools at the commencement of the 1957-1958 session in September 1957. This date has heretofore been fixed, and should stand, for the inception of the injunction in regard to secondary schools. Deferment of its effectuation, asked by the defendants, is not warranted in the circumstances of this case.

Specifically, the defendants request suspension of the injunction while review is sought in the Supreme Court of the recent adverse judgment, in other litigation, of the Court of Appeals for this circuit upon the Pupil Placement Act of Virginia. Declaring that the Act does not provide an adequate administrative remedy, the judgment there dispenses with compliance with the Act as a prerequisite to

application to the court for an injunction against the maintenance of segregation. But here the right to an injunction has already been established. Consideration of administrative remedies will not again be reached unless and until petition is made to enforce the injunction. Plainly, therefore, commencement of the restraint laid in the decree should not be postponed to a determination of the validity of an administrative remedy.

If and when there are complaints of violations of the decree, the court will then inquire if the complainant has first submitted, or has adequate means of submitting, his grievance for correction administratively. At that time it will weigh the complaint and any administrative action taken thereon, to ascertain whether the decree has or has not been followed, and if not, the reason for the failure. Thereupon it will make such further order as is appropriate. In this way specificity and precision will be given to each complaint, it will be individualized, and it will be appraised in its own peculiar environment, of course in the light, too, of the regulations and precedents then at hand.

II. The court must deny the plaintiffs' request that the decree be enlarged to include a declaration paralleling the ruling of the Court of Appeals, in effect allowing students to bypass the Pupil Placement Act. The sufficiency of the Act has not been previously an issue in this suit and is now advanced prematurely. Also, a ruling on it now would be unwise, because for neither party is it in an appealable posture. Finally, the holding of the Court of Appeals is in abeyance pro tempore.

With propriety, however, we can observe that quite obviously the July 31, 1596 decree recognizes only an adequate administrative remedy—one that is efficacious and expeditious, even apart from any question of its constitutionality.

Pursuit of an unreasonable or unavailing form of redress is not exacted by the decree.

III. Statutory costs will be awarded in accordance with the motion.

(s) Albert V. Bryan
United States District Judge

July 27, 1957.

III.

COURT'S ORDER ON MOTION TO AMEND ORIGINAL DECREE

(Dated July 29, 1957)

This action came on to be heard on July 27, 1957, upon plaintiffs' motion to modify the judgment entered therein on July 31, 1956, and was argued by counsel.

Upon consideration whereof, the Court being of opinion, for the reasons stated in the memorandum of the court filed July 27, 1957, that the motion should be granted to the extent hereinafter declared, it is *Adjudged, Ordered* and *Decreed:*

1. That the injunction specified in said judgment become in respect to both elementary and secondary schools effective at the commencement of the regular school term for 1957-1958 commencing in September, 1957;

2. That the plaintiffs recover from the defendants their costs in this action in both this court and the United States Court of Appeals for the Fourth Circuit; and

3. That all other provisions of said judgment shall remain in full force and effect.

(s) Albert V. Bryan
United States District Judge

July 29, 1957.

IV.

PLAINTIFFS' MOTION FOR FURTHER RELIEF

(Filed September 9, 1957)

Plaintiffs, E. Leslie Hamm, Jr., an infant, by E. Leslie Hamm, his father and next friend, Louis G. Turner and Melvin H. Turner, infants, by Phyllis S. Costley, their mother and next friend, move the Court to grant them further necessary and proper relief and, in support thereof, state:

1. Said plaintiffs each made timely application to defendants for admission for the 1957-1958 school session to a public school in Arlington County, Virginia, theretofore and now maintained for and attended by white persons only. Said plaintiffs were each denied admission to such schools on the ground that, by reason of the provisions of the legislation commonly referred to as the "Pupil Placement Act," (Code of Virginia, 1950, Title 22, Chapter 12, Article 1.1, Sections 22-232.1 to 22-232.16, inclusive) defendants lacked authority to admit infant plaintiffs to such schools. Defendants have denied each such plaintiff who has not applied to the Pupil Placement Board of Virginia for assignment to a public school admission to any public school in said County.

2. The Pupil Placement Act is an integral part of a legislative plan to retain segregated public schools in Virginia. It operates conjunctively with Items 133, 134, 137, 138 and 143, Chapter 71, Acts of Assembly, Extra Session 1956, and Sections 22-188.3 to 22-188.15, inclusive, and Sections 22-188.30 to 22-188.40, inclusive, of the Code of Virginia of 1950, to render impossible the elimination of racial segregation in public schools, and to render futile any effort to obtain a nonsegregated public education by pursuing its provisions. In consequence thereof, the Pupil Placement Act

denies infant plaintiffs their liberty without the due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, and does not afford an administrative remedy that plaintiffs are legally required to exhaust as a condition precedent to seeking relief in this Court.

WHEREFORE, said plaintiffs pray the Court to enter a further decree specifically directing defendants to admit said plaintiffs to the schools to which they, respectively, sought admission as hereinbefore set forth, and such further, other, additional or alternative relief as may appear to be equitable and just in the premises.

(s) Edwin C. Brown
Of Counsel for Plaintiffs

Edwin C. Brown
1200 Cameron Street
Alexandria, Virginia

Spottswood W. Robinson, III
623 North Third Street
Richmond 19, Virginia

Oliver W. Hill
118 East Leigh Street
Richmond 19, Virginia

Counsel for Plaintiffs

V.

PLAINTIFFS' MOTION TO INTERVENE
(Filed September 9, 1957)

The above-named applicants for intervention respectfully move the Court for an order permitting them, as members

of the class on behalf of which this action is brought, to intervene as parties-plaintiff in this action, and permitting their proposed complaint in intervention annexed hereto to be filed, in order to assert the matters set forth therein, upon the following grounds:

1. Applicants for intervention are among those generally classified as Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled in the County of Arlington, Virginia. The infant applicants for intervention are within the statutory age limits of eligibility to attend the public schools of said County and possess all qualifications and satisfy all requirements for admission thereto. The adult applicants for intervention are parents of the infant applicants for intervention, and are taxpayers of the United States and said Commonwealth and County. All adult applicants for intervention having control or charge of any unexempted child who has reached the seventh birthday and has not passed the sixteenth birthday are required to send said child to attend school or receive instruction (Code of Virginia, 1950, Title 22, Chapter 12, Article 4, Sections 22-251 to 22-256).

2. Applicants for intervention should be permitted to intervene as parties-plaintiff in this action upon the following grounds:

(a) They are members of the class on behalf of which the original action is brought.

(b) They have a substantial interest in the subject matter of the action.

(c) They will be bound by, and benefit from, any judgment, decree or order entered in this action.

(d) Their interest and the main action have questions of law and fact in common.

(e) Their intervention will not to any extent delay or prejudice the further adjudication of the rights of the original parties.

Wherefore, it is prayed that an order may be entered permitting the above-named applicants for intervention to intervene as parties-plaintiff in this action, and permitting their proposed complaint in intervention annexed hereto to be filed, in order to assert the matters set forth therein.

(s) Edwin C. Brown
Of Counsel for Applicants
for Intervention

Edwin C. Brown,
1200 Cameron Street,
Alexandria, Virginia

Spottswood W. Robinson, III,
623 North Third Street,
Richmond, Virginia

Oliver W. Hill,
118 East Leigh Street,
Richmond, Virginia

Counsel for Applicants for Intervention

VI.

PLAINTIFFS' COMPLAINT IN INTERVENTION

(Filed September 9, 1957)

1. Intervenors adopt and reassert the allegations of Paragraph 1 of the complaint herein.

2. Intervenors are among those generally classified as Negroes, are citizens of the United States and of the Commonwealth of Virginia, and are residents of and domiciled

in the County of Arlington, Virginia. The infant intervenors are within the statutory age limits of eligibility to attend the public schools of said County and possess all qualifications and satisfy all requirements of admission thereto. The adult intervenors are parents of the infant intervenors, and are taxpayers of the United States and said Commonwealth and County. All adult intervenors having control or charge of any unexempted child who has reached the seventh birthday and has not passed the sixteenth birthday are required to send said child to attend school or receive instruction (Code of Virginia, 1950, Title 22, Chapter 12, Article 4, Sections 22-251 to 22-256).

3. Intervenors adopt and reassert the allegations of Paragraphs 5 to 8, inclusive, of the complaint herein, references there to the infant plaintiffs to include the infant intervenors, and those to the adult plaintiffs to include the adult intervenors, and those to the plaintiffs without specifications to include all intervenors.

4. Each infant intervenor made timely application to defendants for admission for the 1957-1958 school session to a public school in Arlington County, Virginia, theretofore and now maintained for and attended by white persons only. Each infant intervenor was denied admission to such schools on the ground that, by reason of the provisions of the legislation commonly referred to as the "Pupil Placement Act," (Code of Virginia, 1950, Title 22, Chapter 12, Article 1.1, Sections 22-232.1 to 22-232.16, inclusive) defendants lacked authority to admit infant intervenors to such schools. Defendants have denied each infant intervenor who has not applied to the Pupil Placement Board of Virginia for assignment to a public school admission to any public school in said County.

5. The Pupil Placement Act is an integral part of a

legislative plan to retain segregated public schools in Virginia. It operates conjunctively with Items 133, 134, 137, 138 and 143, Chapter 71, Acts of Assembly, Extra Session 1956, and Sections 22-188.3 to 22-188.15, inclusive, and Sections 22-188.30 to 22-188.40, inclusive, of the Code of Virginia of 1950, to render impossible the elimination of racial segregation in public schools, and to render futile any effort to obtain a nonsegregated public education by pursuing its provisions. In consequence thereof, the Pupil Placement Act denies intervenors their liberty without due process of law, and the equal protection of the laws, secured by the Fourteenth Amendment of the Constitution of the United States, and does not afford an administrative remedy that intervenors are legally required to exhaust as a condition precedent to seeking relief in this Court.

WHEREFORE, intervenors pray that upon the filing of this complaint, as may appear proper and convenient, this Court advance this action on the docket and order a speedy hearing of the same according to law, and grant to intervenors all the relief prayed for in the motion for further relief filed by original plaintiffs herein.

(s) Edwin C. Brown
Of Counsel for Intervenors

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1200 Cameron Street
Alexandria, Virginia

Spottswood W. Robinson, III,
623 North Third Street
Richmond 19, Virginia

Oliver W. Hill
118 East Leigh Street
Richmond 19, Virginia

Counsel for Intervenors

VII.

COURT'S ORDER FOR HEARING ON MOTION FOR FURTHER RELIEF

(Dated September 9, 1957)

Upon consideration of the motion of E. Leslie Hamm, Jr., an infant, by H. Leslie Hamm, his father and next friend; Louis C. Turner and Melvin H. Turner, infants, by Phyllis S. Costley, their mother and next friend; Harolyn Johnson and Rita Johnson, by Harold Johnson, their father and next friend; Robert A. Eldridge, III., by Robert A. Eldridge, Jr., his father and next friend; George Tyrone Nelson, by George M. Nelson, his father and next friend; Harold Johnson; Robert A. Eldridge, Jr.; and of George M. Nelson that the court enter a further decree specifically directing the defendants to admit the plaintiff public school pupils to the public schools of the County of Arlington, Virginia, to which they, respectively, have sought admission as set forth in said motion, and for other, additional and alternative relief, it is

ORDERED:

(1) That the said motion be, and it is hereby, set for hearing before this court at 10 o'clock A.M., D.S.T. on the 11th day of September, 1957;

(2) That at said hearing the movants offer their evidence in support of the said motion and produce such other evidence as may then be required of them by the court;

(3) That the defendants personally appear at said hearing in answer to the said motion, offer such evidence as they may deem pertinent, bring with them for examination as witnesses, if called, the principals of the said schools to which the plaintiff pupils have made application for admis-

sion, as aforesaid, as well as any other employees of the defendants having the duty of admitting pupils into said schools, and produce such other evidence as may be required of them by the court at said hearing; and

(4) That a copy of this order be forthwith served by the Marshal upon the defendants and copies thereof be immediately mailed by the Clerk to counsel of record for the defendants.

(s) Albert V. Bryan
United States District Judge

September 9th, 1957.

VIII.

COURT'S ORDER ON MOTION TO INTERVENE
(Entered September 9, 1957)

Upon consideration of the motion of Harolyn Johnson and Rita Johnson, by Harold Johnson, their father and next friend; Robert A. Eldridge, III., by Robert A. Eldridge, Jr., his father and next friend; George Tyrone Nelson, by George M. Nelson, his father and next friend; Harold Johnson; Robert A. Eldridge, Jr.; and of George M. Nelson to intervene as parties plaintiff in this action and to file their complaint in this action in intervention, it is

ORDERED that said motion be, and it is hereby, granted, and the persons just named are hereby admitted as parties plaintiff in this action, and their complaint in intervention, being now tendered, is filed in this action.

Let a copy of this order be forthwith served by the Mar-

shal upon the defendants and copies thereof be immediately mailed by the Clerk to counsel of record for the defendants.

(s) Albert V. Bryan
United States District Judge

September 9, 1957.

IX.

DEFENDANTS' MOTION TO DISMISS THE MOTION FOR FURTHER RELIEF

Now come the defendants, County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia, and move the Court to dismiss the motion for further relief heretofore filed by the plaintiffs on September 9, 1957, on the following grounds:

1. These defendants are now without power or authority to make assignments to the public schools of Arlington County, Virginia, in that by Chapter 70 of the Acts of Assembly, Extra Session 1956, effective December 29, 1956, they were divested of all power to determine the school to which any child should be admitted; and pursuant to said Act all power of enrollment or placement of pupils is now vested in a Pupil Placement Board.

2. The plaintiffs have not availed themselves of the administrative procedure set forth in said Chapter 70 of the Acts of Assembly, Extra Session 1956, and have not applied for admission to any particular school in the manner required by said Chapter.

3. The said motion for further relief does not allege any facts upon which the relief sought may be granted in that said motion does not allege that the plaintiffs have been denied admission to any school on account of race or color; nor does said motion allege any facts which would entitle any of the plaintiffs admission to the particular schools to which they applied and were denied admission.

4. This Court should not now pass upon the constitutionality of the said Chapter 70 in that the question of the constitutionality of Chapter 70 is now pending before the Supreme Court of Appeals of Virginia.

5. The plaintiffs have not conformed to the procedure set forth in the opinion of this Court dated July 27, 1957, in that the said motion for further relief does not present issues of the individual cases of each plaintiff which must be appraised in its own peculiar environment.

Of Counsel for the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia

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Counsel for Defendants

X.

DEFENDANTS' MOTION TO CONTINUE HEARING ON PLAINTIFFS' MOTION FOR FURTHER RELIEF

(Filed September 11, 1957)

Now come the defendants, County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia, and move the Court to continue the hearing on the motion for further relief filed by the plaintiffs herein on September 9, 1957, which is now set for hearing on September 11, 1957, for the following reasons:

1. The motion was filed without prior service of copies upon counsel for the defendants and without notice to said counsel.

2. The time of the hearing was set without notice to counsel for the defendants.

3. The notice of the hearing was served less than five days before the date specified for the hearing, contrary to Rule 6(d) of the Federal Rules of Civil Procedure; and also in violation of Rule 13 of this Court.

4. The defendants have not had adequate time for preparation of said hearing.

Of Counsel for the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia

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Counsel for Defendants

XI.

DEFENDANTS' MOTION TO VACATE ORDER ON MOTION TO INTERVENE

(Filed September 11, 1957)

Now come the defendants, County School Board of Arlington County, Virginia, and T. Edward Rutter, Division

Superintendent of Schools, Arlington County, Virginia, and move the Court to vacate its order entered herein on the 9th day of September, 1957, entitled "Order on Motion to Intervene" on the ground that said order was prematurely and improvidently awarded.

Of Counsel for the County School Board of Arlington County, Virginia and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia

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Counsel for Defendants

XII.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Dated September 14, 1957)

Seven negro children of school age were refused admission as pupils in the public schools of Arlington County, Virginia on the opening day of the current session. The ground of the refusal was that the applicants had not complied with, or obeyed, the provisions of the Pupil Placement Act of Virginia, 1956 Acts, Extra Session, c. 70. That statute requires every child before entering a public school for the first time, or on graduation from one school to another, to apply to the Pupil Placement Board for enrollment. In refusing the admission, the school principals were following the directions of the defendant County School Board and Superintendent who, in turn, were following the Act. These children, now called the plaintiffs, assert that the refusal violates the injunction previously entered by this court restraining the defendants from denying enrollment in any public school of the County, on account of race or color, to any otherwise qualified child. The plaintiffs move for a supplemental decree directing the admission of these children to the schools. The court will grant the motion.

I. In its injunctive decree the court took notice of existing and future State and local rules and administrative remedies for the assignment of children to public schools. It directed conformance with them before the complainant should turn to the court. Of course, the decree only contemplated reasonable regulations and remedies. Defendants' position that the Pupil Placement Act is such a regulation or remedy is untenable. The procedure there pre-

scribed is too sluggish and prolix to constitute a reasonable remedial process. On this point we also rely upon the reasoning of the Court of Appeals for this Circuit in School Board of the City of Newport News et al. v. Atkins et al., July 13, 1957.

It must be remembered that we are viewing the Act in a different frame from the setting in which it was tested by the Court of Appeals. The Act was then appraised as an administrative remedy which had to be observed before the persons aggrieved could seek a decree of judicial relief. Now the Act is measured against the enforcement of a decree already granted. It is, too, a decree which was passed before the adoption of the Placement Act and bears the approval of the final courts of appeal. For these reasons decision here need not await the outcome of the pending effort to obtain a review of the Court of Appeals' judgment.

This court had hoped that the initial step provided in the Placement Act might be isolated and utilized as a fair and practicable administrative remedy. It thought that a requirement that a pupil first entering a school, or transferring from one school to another, should seek placement from some official or board, would not only be a reasonable, but a necessary regulation as well, in the administration of the school. This agency, it seemed, might validly be a State agency exclusively—such as the Placement Board.

However, the court finds that it cannot fairly require the plaintiffs even to submit their applications to the Board for school-assignment. The reason is that the form prescribed therefor commits the applicant to accept a school "which the Board deems most appropriate in accordance with the provisions" of the Pupil Placement Act. Submission to that Act amounts almost to assent to a racially segregated school. But even if the form be signed "under protest", the

petitioner would not have an unfettered and free tribunal to act on his request. The Board still deliberates, on a racial question, under threat of loss of State money to the applicant's school if children of different races are taught there.

II. The court must overrule the claim of the County School Board and Superintendent that they should not be held to answer for the denial of admittance to the plaintiffs. In this they urge that the Placement Board had sole control of admissions—that the School Board and Superintendent had been divested by the Act of every power in this respect. As just explained, the Placement Act and the assignment powers of the Placement Board are not acceptable as regulations or remedies suspending direct obedience of the injunction. In law the defendants are charged with notice of these infirmities in the Board's authority. Actually the plaintiffs were denied admission by the defendants' agents—the school principals—while the defendants had the custody and administration of the schools in question.

Hence, the refusal by the defendants, immediately or through their agents, to admit the applicants cannot here be justified by reliance upon the Placement Board. The defendants were impotable, also, with knowledge that the injunction was binding on the Placement Board. The latter was the successor to a part of the School Board's prior duties; as a successor in office to the School Board, the Placement Board is one of those specifically restrained by the injunction.

III. We look, then, to see if race or color was the basis for the denial by the defendants and their agents of admission of the applicants to the named schools. It is immaterial that the defendants may not have intended to deny admission

on account of race or color. The inquiry is purely objective. The result, not the intendment, of their acts is determinative.

In this inquiry we have no administrative decision with which to commence, save in one instance. Consequently, the court must examine the evidence in regard to each applicant and ascertain whether it indicates that the denial of admittance was there due solely to race or color. The court is not undertaking the task of assigning pupils to the schools. That is the function of the school authorities and the court has no inclination to assume that responsibility. Carson v. Warlick, 1956, 4 cir., 238 F. 2d 724, 728. But it is the obligation of the court to determine whether the rejection of any of the plaintiffs was solely for his race or color. In this light only does the court now review the evidence.

IV. Arlington is a small county in size, but thickly populated and having the appearance of a city. It has 22,677 (about) pupils in its public schools. Of those 1432 are negroes—946 in the elementary schools, 311 in the junior high school (7th, 8th and 9th grades) and 175 in the senior high school (10th, 11th and 12th grades).

All together there are 40 school buildings in the County. These include 4 schools for negroes — one high school, Hoffman-Boston (combining junior and senior) located in the extreme southern end of the County and embracing an elementary school with it; and 2 other elementary schools, Drew-Kemper near the Hoffman-Boston, and Langston in the district to be mentioned in a moment as the northern Hoffman-Boston.

There are 2 high schools for the white children, Washington and Lee in and to serve the northern half, and Wakefield in and for the south half, of Arlington; there are 6 junior high schools, Stratford and Swanson among them, scattered throughout the County for the white children; and

there are 28 elementary "white" schools, including Fillmore and Patrick Henry.

Each school and its contiguous territory form a school district. The boundaries of a district are drawn to include the school population in the vicinity of the school as far as the facilities of the school will allow. Before the creation of the Placement Board the pupils assignable to each school were, if otherwise eligible, limited to those who resided in the school district. These lines have never been altered by the School Board, but the defendants point out that the Placement Board may or may not follow these bounds. Apparently it has done so.

Nothing in the evidence indicates that any of the plaintiffs is not qualified in his studies to enter the school which he sought to enter. Each applicant applied to a "white" school, but each lives in the district of that school or of another nearby "white" school. Nor did the evidence reveal a lack of space for him, or that the school did not afford the courses suited to the applicant. Counsel for the defendants explained that they did not adduce evidence as to the eligibility of the applicants for their respective schools because this was a matter within the purview of the Placement Board. Anyway, no intimation of disqualification appeared as to any applicant.

A review of the evidence is convincing that the only ground, aside from the provisions of the Placement Act, for the rejection of the plaintiffs was that they were of the negro race. The rejection was simply the adherence to the prior practice of segregation. No other hypothesis can be sustained in any of the seven instances. The evidence as to the plaintiffs shows as follows:

(1) Rita and Harolyn Johnson, 15 and 16 years old, personally presented themselves for admission to the Wash-

ington and Lee High School on the opening day, September 5, 1957. They desired to enter the 10th and 12th grades, respectively, and carried with them documentary evidence of their academic proficiency, having attended schools in the District of Columbia during the last school session. Their residence is 2901 North Lexington Street, in the northern extremity of the County. It was within the Washington and Lee School District and a distance of approximately 2 miles (air line) from the school. The two other senior County high schools were twice that distance from the Johnson's.

They were refused admission because they had not executed the Board's placement forms. Their father declining to allow them to complete the forms, they are now attending school in the District of Columbia.

(2) Robert A. Eldridge, aged 9, wished to enter the 4th grade. As a new arrival in the County, his father had made application on August 15, 1957, for the enrollment of Robert in Fillmore, an elementary school. He procured a placement form but did not file it. On the opening of school Robert was refused admission into Fillmore for lack of the form.

This boy lives at First and Fillmore Streets, a distance of slightly more than one city block from the Fillmore School, but is within the School District of Patrick Henry, an elementary school six city blocks away. A white child living there would normally enter either Patrick Henry or Fillmore. The nearest school used by colored children was 1.25 miles away.

(3) Leslie Hamm had completed the elementary courses at the County's Langston School, and wanted to enter Stratford Junior High School. He was refused admission

on the opening day of school at Stratford because he had not been assigned by the Placement Board, never having made application.

He resides at 1900 North Cameron Street. This address is within what we describe as the northern Hoffman-Boston District. This district, however, is 3.5 miles from the Hoffman-Boston School and from the area around that school also designated as a Hoffman-Boston District. The northern Hoffman-Boston District is set apart apparently because the area is occupied predominantly by negroes. However, a white child living in the northern District would be eligible to attend either the Swanson or Stratford Junior High School. Swanson is something more than a mile from the Hamm residence, Stratford slightly less than a mile.

(4) Louis George Turner and Melvin H. Turner, having respectively finished the 7th and 8th grades in one of the colored schools in the County, sought admission to the Swanson Junior High School on August 22, as well as on the opening day. Not having filled out the placement form, they were both refused admission. They live at the intersection of 22nd Street, North, and George Mason Drive. This is within the northern District of Hoffman-Boston. A white child in this section would ordinarily go either to Swanson or Williamsburg Junior High School. Swanson is less than a mile distant, while Williamsburg is about 1.25 miles away.

(5) George T. Nelson filled out a placement form and filed it on August 19 or 26 with the principal of Stratford Junior High School. On this application, the Pupil Placement Board assigned him to Hoffman-Boston School. On the opening day of school he was refused admission at Stratford.

Nelson lives at 2005 North Cameron Street. This is within the northern Hoffman-Boston District. Hoffman-Boston School is 6 miles from his home, while Straftford is ½ mile away. Swanson Junior High School is a little further away. The basis for the Board's placement is not given; no reason is evident for ignoring Stratford or Swanson. It cannot be accepted, for it is utterly without evidence to support it.

V. The defendants and their agents, in barring the admission of the complainants, did not intend any defiance of the injunction. The bona fides of their assurance to the court—that they believed they should not admit the applicants without an assignment by the Placement Board—cannot be doubted. However, the defendants and their agents must now understand that the injunction is paramount in the present circumstances and that they can no longer refuse admittance to the plaintiffs.

The injunction will affect the school attendance very slightly. Into a white school-population of 21,245, only 7 negro children will enter; 1 negro will be with 11,421 white children in the elementary grades; and no more than 6 negroes among the 9,824 white high school students. Of 36 previously "all-white" schools in the County, 4 will be affected by the decree, and then not to a greater extent than 2 negroes in any one of the 4 schools.

The supplemental decree will be effective at the opening of the schools Monday morning, September 23, 1957.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

XIII.

THE COURT'S SUPPLEMENTAL DECREE OF INJUNCTION

(Entered September 14, 1957)

Upon consideration of the motion by and on behalf of Harolyn Johnson, Rita Johnson, Robert A. Eldridge III, George Tyrone Nelson, E. Leslie Hamm, Jr., Louis George Turner and Melvin H. Turner that the court enter a further decree specifically directing the defendants to admit them to the schools to which they have applied for admission for the session of 1957-58, and upon consideration of the evidence and arguments of counsel for all the parties on said motion, the court is of the opinion, on the findings of fact and conclusions of law this day filed, that said motion should be granted, and, therefore, it is

ORDERED that the defendants, their successors in office, agents, representatives, servants, and employees be, and each of them is hereby, restrained and enjoined from refusing to admit the said movants to, or enroll and educate them in, the said schools to which they have made application for admission, that is:

1. Harolyn Johnson in the Washington and Lee High School;

2. Rita Johnson in the Washington and Lee High School;

3. Robert A. Eldridge III in the Fillmore School or the Patrick Henry School;

4. George Tyrone Nelson in the Stratford Junior High School or the Swanson Junior High School;

5. E. Leslie Hamm, Jr. in the Stratford Junior High School or the Swanson Junior High School;

6. Louis George Turner in the Swanson Junior High School; and

7. Melvin H. Turner in the Swanson Junior High School;

upon the presentation by the said movants of themselves for admission, enrollment and education in the said schools commencing at the opening of said schools on the morning of September 23, 1957.

Let copies of this order be forthwith sent to counsel in this cause.

(s) Albert V. Bryan
United States District Judge

September 14, 1957.

XIV.

DEFENDANTS' NOTICE OF APPEAL

(Filed September 16, 1957)

NOTICE IS HEREBY GIVEN that the County School Board of Arlington County, Virginia and T. Edward Rutter, Division Superintendent of Schools, Arlington County, Virginia, defendants named above, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the following:

1. Supplemental Decree of September 14, 1957, enlarging the injunction heretofore granted.

2. Order entered September 11, 1957 denying the defendants' motion to continue the hearing on the plaintiffs' motion for further relief.

3. Order entered September 11, 1957 denying motion of defendants to vacate order of intervention theretofore entered by the Court on September 9, 1957.

4. Order entered September 11, 1957 denying the defendants' motion to dissolve the injunction theretofore awarded.

(s) Frank L. Ball
Frank L. Ball
1437 North Court House Road
Arlington, Virginia

(s) James H. Simmonds
James H. Simmonds
1500 N. Court House Road
Arlington, Virginia

Of Counsel for the County School Board of Arlington County, Virginia, and T. Edward Rutter, Division Superintendent of Schools for the County of Arlington, Va.

J. Lindsay Almond, Jr.
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Counsel for Defendants

XV.

EXCERPTS FROM REPORTER'S TRANSCRIPT

A.

Testimony of Harold M. Johnson

DIRECT EXAMINATION

[TR. PP. 8-9]

By Mr. Brown:

Q Dr. Johnson, did there come a time when you presented your children for admission to the schools in Arlington?

A Yes, there did.

Q And when was it?

A That was last Thursday, the opening day of the schools in Arlington County.

Q Now did you present both your daughters to the same school?

A I did; yes.

Q And what school was that?

A That was at Washington and Lee High School.

Q And were they admitted to the school?

A No, they were not.

Q Was any reason given at that time as to why they were not admitted?

A The person with whom I talked said that since they were new to the Washington and Lee School that I would have to sign pupil placement forms and that I might sign them then or I might take them home and either bring them back to the school, to that particular school, or I might take them to a Board that had been set up in Arlington County in the Radio Building. I don't have the exact address.

THE COURT: That is the Pupil Placement Board which had been set up?

THE WITNESS: In Arlington County, I could take it to either of those two places, either back to Washington and Lee High School, or to a Pupil Placement Board in Arlington County.

BY MR. BROWN:

Q Were you given pupil placement forms for each of your children?

A Yes, I was.

Q Did you execute those forms?

A No, I did not.

* * *

CROSS-EXAMINATION

[TR. PP. 14-15]

BY MR. BALL:

Q Do I understand you to say that admission was denied?

A They told me that my children could not go to school at Washington and Lee until I had filled ou .ie pupil placement forms.

* * *

[TR. PP. 16-18]

BY MR. BALL:

Q Did he say anything to you about race?

A No, sir; he did not.

Q Did you say anything to him about race?

A No, I did not.

Q Didn't he tell you that he had no authority to register anybody there but the placement had to be made by State Board?

A I don't recall his saying he had no authority, but those particular words, but he did tell me that I would have to fill out the pupil placement form in order to be, in order for my daughters to be admitted.

Q He told you no one could be admitted to that school without having permit from the Placement Board?

A He didn't tell me no one. I don't believe that, but I am trying to recall what he said. I don't recall those particular words.

Q Did he say anything at all to indicate that he was treating you any differently from what he would a white person who was applying?

A No, he didn't.

Q Nothing whatever.

I understood you to say he told you that the Placement Board had an office in Arlington?

A Yes, that is right.

Q He gave you that address?

A He did. I wrote it down.

Q Did he give you the forms?

A Yes.

Q And what did you tell him when he handed you the forms?

A I told him that I was going to take the forms home and talk it over with my wife and then we would decide what to do.

Q And you decided to ignore the provisions of the Virginia law completely, didn't you, and not sign any forms?

A Well, if that is the Virginia law; yes, I did decide that.

Q And did you go back and tell the Principal that?

A No.

Q Did you go back to school at all?

A I did not.

Q The only time you have been there then was when you went and they told you to get your form, your placement from the Placement Board, and you told them you'd think that over and that was all, you never went back any more?

A That's right.

Q Not communicated with the school at all?

A No.

* * *

B.

Testimony of Robert A. Eldridge

DIRECT EXAMINATION

[TR. PP. 22-23]

BY MR. BROWN:

Q And do you have children of school age, Mr. Eldridge?

A I have a son, Robert A. Eldridge, who is nine years old, sir.

Q And did there come a time when you presented him for admission to the school in Arlington County, Virginia?

A Yes, sir.

Q And to what school did you present your child?

A Being a new person moving into the Arlington area, I read in the papers that you should take your children to a

school on August 15th, so I took my boy to the Patrick Henry School about 1:50 p. m. on that date. I spoke to a lady there and I told her that I just moved into the area and I'd like to register my boy in order that he might attend the fall term, elementary school.

Q What were you told at the time that you presented your child for registration?

A The lady, Miss Vance, I believe, should be the name —she told me that I would have to fill out a pupil placement form and I left the school at that particular time without the placement form, and told her I would think about it. I decided later, about an hour later, to go back to the school and about 2:30 p. m. the same day I did pick up a pupil placement form with the — I explained to Miss Vance that I would speak to my wife and we would talk, we'd confer about it and decide whether we should turn it in or not.

Q And you obtained the pupil placement form from Miss Vance?

A Yes, that is her correct —

Q I show you document here and ask you if you can identify it?

A I can identify it by my signature and the date that I put on the bottom.

Q Is that the form that was given you by Miss Vance?

A That's correct.

Q And did you, or did you not execute that form?

A I did not, sir.

• • •

[tr. tr. 26-27]

Q Tell me this, Mr. Eldridge, did anyone at any of those schools that you went to making admission inquire

as to whether or not you had your child's birth certificate or if you had your child's previous records or any other prerequisites for filing your admission?

Did anyone ask you anything?

A No, they did not, Mr. Brown. The question was they were the people who talked to me were very specific in stating that they couldn't do anything for me unless I filled out the placement form and I was very specific to ask if that was the situation and I was told that that was definitely the situation.

Q In other words, they didn't inquire about anything else other than your executing the pupil placement form?

A That was the only inquiry made.

* * *

CROSS-EXAMINATION

[TR. P. 35]

BY MR. BALL:

Q Did anybody tell you your child couldn't get into the Arlington School System?

A Not in that exact—not in exact way you say it.

Q Did anybody mention race to you, anybody connected with the schools at any time?

A Did not mention race to me.

* * *

[TR. P. 37]

Q Now you got your forms from the Patrick Henry School?

A That is correct, on the fifteenth of August.

Q And did you read the form over there at the school?

A Yes, and as I said, I read it partially.

Q But you didn't make up your mind there?

A That is correct, at that particular time.

Q You talked to your wife afterwards?

A Yes, I—I decided that I had better go back. I didn't take the form at 1:50 when I was there on the date, so after going back home I decided that I should take the form in the event that I did decide to sign it.

Q Yes.

A So I went back and got the form and after talking with my wife we decided that we would not sign it.

* * *

C.

Testimony of Dorothy P. Nelson

CROSS-EXAMINATION

[TR. P. 67]

BY MR. BALL:

Q You talked with Mr. Richmond; no statement made about race at all, was it?

A No, sir; no question.

* * *

[TR. PP. 72-73]

Q Did you claim that your written application asked for admission to Stratford, your written application mention Stratford at all?

A I don't understand you clearly.

Q You filled in a form, didn't you—let me—is that the form you filled in? Is that your handwriting on there? Look at it carefully. Take a second.

A This is my handwriting right here.

Q That is the form, isn't it, you filled in?

A Yes, it is.

Q Is Stratford mentioned there anywhere in that form, or in your writing, or anybody's writing anywhere?

A I don't see it.

Q Is not, is it?

A No, it is not.

Q You claim that you filled in any other form except that one?

A That is all the form.

Q That is the only one. So you didn't ask for a transfer to Stratford because you didn't even mention Stratford; is that right? Isn't it?

A I didn't ask for a transfer. That is the only form we had.

* * *

D.

Testimony of Arthur M. Costley, Sr.

DIRECT EXAMINATION

[TR. PP. 77-78]

BY MR. HILL:

Q What school was it? What happened?

A My wife took them up to Swanson Junior High and they gave her a placement form to fill out. In fact, they filled out the form and actually gave it to her and told her she would have to sign that in order for the child to be placed in any school or transfer. My wife took the children to the school and she was given a placement form.

Q Speak a little louder. Remember the Judge has got to hear you.

A She was given a placement form and this form was filled out at the school, and they told her that if she wanted

the kids to get in school or transfer they'd have to, she'd have to sign this form, so she told them that she'd take it home and talk with me about it. She brought it home and we decided that we wouldn't sign it.

Q Did you look at the form carefully?

A I didn't, no. I didn't look at it too carefully because I read such about the placement form being unconstitutional and all, and I just decided I didn't want to sign it.

* * *

[TR. PP. 81-82]

Q Now after this series of correspondence concerning your child, what did you do, Mr. Costley?

A Well, we consulted the map, and we decided that the Swanson School was nearer us, to the boundary line of Swanson School.

Q Talk louder so the Judge can hear you.

A Than any other school, so I thought I would take my kids there to the Swanson. I went up to Swanson that morning, opening of school, and I was shown to the Principal's office. The Principal acknowledged that my wife had been there before, and, consequently, she knew the boys and I told her that I'd like to enter my boys in school, so she said that the procedure of the Placement Board was that you had to fill out the form and sign it, and if I didn't want to sign the form, I told her I hadn't signed it—and she said, "Well, then if you want to get your children in school in Virginia," that you would have to send them back to the school that they originally came from.

Q You would have to go back to the school?

A Back to the school which they attended.

Q Originally came from.

And was there anything further said on that date?

A No, there was nothing further said.

Q Were your children admitted?

A No, they weren't admitted to Swanson. I took them back to Hoffman-Boston.

* * *

CROSS-EXAMINATION

[TR. P. 89]

BY MR. BALL:

Q And they told you at the school where you went that you, that the Placement Board had control of that situation, didn't they, have to make application to them?

A Yes.

Q And you never wrote to the Placement Board asking for transfer, did you?

A No, I didn't.

Q Didn't fill in one of their forms, didn't write a letter, didn't do anything so far as the Placement Board is concerned?

A No.

* * *

E.

Testimony of Dorothy M. Hamm

DIRECT EXAMINATION

[TR. P. 95]

BY MR. BROWN:

A. On the twenty-third of August my husband and I were by [illegible] to make application for admission and we were told that the only manner of application was the pupil placement form.

Q Who was it that told you that, if you know?

A Mr. Richmond, Principal.

* * *

CROSS-EXAMINATION

[TR. P. 101]

BY MR. BALL:

Q He never mentioned race at all to you?

A No, he did not.

Q And you never mentioned to him?

A No, I didn't.

Q So that was not discussed in any way?

A No.

Q The only thing that he told you that the placement form would have to filled out before he could enter any school in August?

A That's right. Those were the instructions he had.

Q Did you ever fill that form in?

A No, I did not. I also received one in June. My son brought one home in June, and I did not fill that one in and neither did I fill the other one in.

XVI.

RULINGS OF THE COURT

[TR. PP. 4-5]

THE COURT: Gentlemen, I think the motion to vacate the order of intervention should be denied. The intervention was allowed heretofore because intervention of this sort by a person similarly situated was generally allowed. The

order permitting the intervention, of course, is always subject thereafter to attack just as it has been attacked today. But the immediate entry of the order did harm to no one. The Court is also of the opinion that the motion to continue should be denied. At the time the order was presented to the Court to set this motion for hearing, it was of the opinion either that the motions had been served, or what would amount practically to the same thing, that they would be immediately served. Counsel for the plaintiff explained that he had not inserted in the certificate the date of the hearing of the motion because he did not know it, and I am sure that counsel was of the same opinion as the Court was, that the subsequent delivery of the motion the same day practically would have the effect of antecedent delivery of it. The Court was well aware of the five days' rule and practice but fixed a shorter time in view of the known urgency of the situation; fixed it too, having in mind that if there was any serious objection to the time fixed, it could be changed on the motion. It is always difficult in fixing time for hearing in a case where there are so many counsel. Frequently the Court has to fix a date arbitrarily and then wait for objections. It has also to bear in mind the circumstances of the case, the circumstances of counsel, and circumstances of its own docket. Where the Court believes that no injury will be done by proceeding with the case, but should any develop, why, the Court can [illegible]

The motion to dismiss [illegible] is likewise denied. That goes to the very merits of the case which would be developed on hearing of the principal motion in the case.

I think that takes care of the preliminary motions. The Court is now ready to proceed with the principal motion.